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IN THE

Supreme Court of the United States

October Term, 1962

No. 1069

IMPARATO STEVEDORING CORPORATION,

Petitioner,

—v.—

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 29, 1963

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—v.—

UNITED STATES LINES COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 2, 1963, as to which rehearing was denied on February 5, 1963.

Opinions of Courts Below

The opinion of the United States District Court for the Eastern District of New York is reported in 202 F. Supp. 600. It is set forth at pages 194a-205a of the printed Transcript of Record and is printed in the Appendix hereto, p. 19.

The opinion of the United States Court of Appeals, contained in the Transcript of Record, pp. 229a-235a, is printed in the Appendix hereto, p. 33, and is reported in 311 F. 2d 413.

Jurisdiction

The judgment of the Court of Appeals was entered on January 2, 1963 (Tr. 236a). A timely petition for rehearing and rehearing *en banc* was filed on January 16, 1963 and was denied on February 5, 1963 (Tr. 249a-254a).

This petition for a writ of certiorari is filed less than 90 days after the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Does a jury verdict in favor of a longshoreman against a shipowner mold the issues insofar as shipowner and stevedore-contractor are involved so that "automatic" indemnity as a matter of law must be granted against the stevedore-contractor despite the fact that the Trial Court on undisputed evidence has made findings of fact, supported by the evidence, that the stevedore-contractor acted reasonably in face of a dangerous condition and did not breach its warranty of workmanlike service?

2. Is a stevedore deprived of his property without due process of law where, based solely on the jury's verdict in the primary action of longshoreman against shipowner, the stevedore has been held by an Appellate Court to have breached its warranty of workmanlike service—this, despite the undisputed evidence and finding by the Trial Court that it performed its job properly and in accordance with safe practice?

3. If "automatic" indemnity is to be granted to a shipowner against a stevedore-contractor despite the proof and

findings by the trier of the facts that the stevedore did not breach his warranty of workmanlike service, is there anything left in a maritime case of Rule 14(a) of the Federal Rules of Civil Procedure which provides that the third party defendant (the stevedore) shall make his defenses to the third party complaint?

Statement of the Case

Michael Caputo, a longshoreman, an employee of the petitioner herein (Imparato Stevedoring Corporation), sustained injury on December 3, 1954 while he was engaged in unloading cargo from the No. 1 lower hold of respondent's (United States Lines Company) vessel, the S.S. American Ranger. This vessel had been loaded at two places in Scotland under the general supervision and control of the S.S. American Ranger.

The cargo was under the exclusive control of the respondent from the time it was loaded in Scotland until three hours before the accident to Caputo.

The vessel crossed the North Atlantic in November and encountered heavy seas. After this crossing it first docked at Boston and then at the Brooklyn Army Base where the No. 1 hatch was opened for the first time since it had been closed after loading at Scotland.

When the No. 1 hatch was opened by petitioner's employees the cargo which was then visible appeared to be in disarray. The wooden crates which comprised this cargo varied in size and some of them seemed wobbly. No dunnage had been used for flooring when the vessel had been loaded in Scotland and the longshoremen in New York had to do the best they could. The longshoremen had to work on top of the crates to discharge this cargo and it was proper

procedure to work on top of this type of cargo. To avoid much walking over the cargo the petitioner formed a bucket brigade which permitted the headman to pick up a piece of cargo, turn around, take no more than 2 or 3 steps and hand the piece of cargo to the next man in the brigade who in turn passed it on to the next man.

This unloading continued for 3½ hours prior to Caputo's accident with no incidents. At the time of the accident Caputo had been following this procedure, the bucket brigade. He was injured when his foot broke through a thin veneer case upon which he walked previously. Said veneer case was one apparently sound but in fact latently defective.

The action of *Caputo* v. *United States Lines Company* was tried to a jury on theories of negligence and unseaworthiness. The jury rendered a verdict for Caputo for $70,000.

On the basis of the evidence adduced at this trial and upon further evidence adduced before the Trial Court after the jury verdict, the Trial Court rendered a detailed opinion (202 F. Supp. 600; Tr. 194a-205a) and extensive Findings of Fact (Tr. 188a-193a) exonerating the petitioner of all liability. The Trial Court after a detailed analysis of the decisional law concluded that (202 F. Supp. 606):

> "Under these circumstances, there was no breach of the stevedore's warranty of performance of workmanlike service. The longshoreman (sic) faced with a condition of wobbly stowage acted reasonably in forming the bucket brigade to eliminate as much activity as possible.
>
> * * * * *
>
> In the case at bar, the only result of improper stowage was to cause the gang to set up the bucket brigade. The plaintiff's injuries were due to the latent defect

in the crate, not foreseeable by the stevedore and hence not caused by improper stowage."

From the judgment in favor of Caputo and the petitioner the shipowner appealed. The United States Court of Appeals for the Second Circuit in a decision by District Judge Dimock affirmed the judgment in favor of Caputo but reversed the judgment in favor of petitioner (311 F. 2d 413; Tr. 229a-235a). A timely petition for rehearing and rehearing *en banc* was filed (Tr. 238a-248a) and denied (Tr. 249a-256a). This timely petition for a writ of certiorari follows.

Reasons for Granting the Writ

1. Importance of the question.

A ship is by nature a uniquely perilous instrumentality. *The State of Maryland*, 85 F. 2d 944, 945. The stevedoring industry is a hazardous one as shown by the high accident rate.[1]

When a longshoreman or other harbor worker is injured in the course of his employment he is entitled to compensation as against his stevedore-employer without any considerations of negligence or fault. Longshoremen & Harbor Workers' Compensation Act, 33 U. S. C. §901 et seq. Said

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[1] "Longshoring frequency (injury) rates are extremely high in comparison with those in general industry * * *." First Annual Report (1960) Public Law 85-742, Safety & Health Administration, Bureau of Labor Standards, U. S. Department of Labor (p. 9).

"Longshoring is basically a materials handling process and as such is hazardous work * * *." "It should be noted, however, that the stevedoring industry has a number of unique factors which intensify the hazardous and tend to make safety work unusually difficult." Longshore Safety Survey (1956), National Academy of Sciences—National Research Council, Publication No. 459.

statute has preserved his right to proceed against a third party (33 U. S. C. §933).

Prior to 1946, said third party, the shipowner or ship, had been liable to the longshoremen only for negligence. Since this Court's decision in 1946 in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 972, a longshoreman or harbor worker can recover against the shipowner or ship on a showing of a latent defect, i.e., unseaworthiness. He is entitled to the warranty of seaworthiness while performing duties traditionally performed by the ship's crew. *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202.

Since 1946 all courts have been inundated with these actions of longshoremen against shipowners, predicated upon unseaworthiness.

When in 1956 this Court decided *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124, 76 S. Ct. 232, and thereafter in 1958 *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 78 S. Ct. 438, and thereafter in 1959 *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 79 S. Ct. 445, and thereafter in 1960 *Waterman S.S. Corp.* v. *Dugan & McNamara*, 364 U. S. 421, 81 S. Ct. 200, the circle has become almost complete.[2]

With those recent decisions the stevedore-employer now is called upon to indemnify the shipowner where it is found that the stevedore, employer of the longshoreman, breached its warranty of workmanlike service to the shipowner whether they be in contractual privity or not.

The progeny which these cases have spawned is monumental. One need only read the advance sheets every week

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[2] 61 Michigan Law Review, No. 3, January 1963—pp. 539-564, Stover, *Longshoreman-Shipowner-Stevedore: The Circle of Liability.*

to appreciate the plethora[3] of decisions involving the triad of longshoreman, shipowner and stevedore-employer. A dispassionate reading of these cases will show that almost every longshoreman's action against a shipowner results in the impleader of the stevedore-employer and virtually in almost every factual situation where the shipowner has been held initially liable to the longshoreman the stevedore is called upon to indemnify the shipowner.

The stevedore has become the *insurer* of the shipowner.

The law which has developed has become an intolerable business burden to the stevedore. His ability to even obtain insurance coverage for his operations has been aggravated.

If the instant decision which is sought to be reviewed prevails then the longshoreman and shipowner hold the

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[3] The treatise writing on this subject has been prolific.

Gilmore & Black, Admiralty, pp. 358-374
25 G. Wash. Law Rev. 100
3 U. C. L. A. Law Review 669
25 G. Wash. Law Rev. 708
66 Yale Law Journal 581
36 Boston U. Law Rev. 312
44 Calif. Law Rev. 800
25 Fordham L. Rev. 174
23 Ins. Couns. Journal 170
34 Notre Dame L. Rev. 576
14 U. of Miami L. Rev. 115
5 N. Y. Law Forum 434
5 N. Y. Law Forum 409
21 NACCA Law Journal 291
22 NACCA Law Journal 307
23 NACCA Law Journal 219
24 NACCA Law Journal 206
25 NACCA Law Journal 284
27 Ins. Counsel Journal 282
27 Ins. Counsel Journal 642
12 Stanford Law Rev. 717
July 1960, Ins. Law Journal
67 Yale Law Journal 1205
Oct. 1962 Journal Bus. Law 340
21 La. Law Rev. 755

issues for a jury's determination[1] and irrespective of the stevedore's defenses which he can assert on the shipowner's behalf against the longshoreman's complaint and on his behalf under Rule 14(a) F. R. C. P. to the shipowner's third party complaint, he is held liable to the shipowner for indemnity despite the proof he adduces and despite the trier of the facts concluding that the stevedore acted reasonably and did not breach his warranty of workmanlike service. He becomes liable for "automatic indemnity", his own conduct notwithstanding.

This is a deprivation of property without due process of law.

A reappraisal of this indemnity situation is of the greatest importance to the shipping industry. It looks for a restatement and a delineation of the scope of a stevedore's responsibility to the shipowner and the latter's responsibility to the stevedore. Unless this Court does so, shipowners are entitled to indemnity as a matter of law and their counsel can rest assured that their counsel fees will be eventually paid by the stevedore and undoubtedly at higher rates than shipowner's counsel would charge the shipowner.

This case commends itself to this Court's review. It is part and parcel of the problem which this Court has seen fit to review in granting certiorari on April 15, 1963 in *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 310 F. 2d 481, No. 876 in this Court.

[1] Indeed, the molding of the issues by the longshoreman and shipowner and their concluding settlement without a jury's verdict leaves him exposed to liability by a mere finding that the shipowner acted reasonably. *Damanti* v. *A/S Inger*, 314 F. 2d 394.

2. Conflict in decisions of Courts of Appeal.

By the holding in this case the Court of Appeals for the Second Circuit has granted indemnity to a shipowner against a stevedore despite the evidence on the trial which had come from the mouths of witnesses and despite the detailed findings of fact by the trier of the facts that the stevedore acted reasonably under the circumstances and did not breach his warranty of workmanlike service.

It would be beyond physical possibility and contrary to common sense for a stevedore contractor in a *discharging* operation to (a) prevent his men from walking upon cases of cargo which were in disarray because of the weather the ship encountered in an Atlantic crossing, (b) knock the cargo down willy-nilly with ship's equipment before any men walked on the cargo, (c) restow the cargo with dunnage between the cargo and *then* (d) discharge the cargo from the compact stow which it had made.

Knocking the cases of cargo down with a metal ball (like in a demolition of a building) in order that the longshoreman would not walk on them in discharging them would not only do damage to the cargo but would be a distinct breach of the stevedore's obligation to render a proper job.

As an alternative the stevedore could refuse to discharge the cargo and be liable to the shipowner for breach of contract.

Yet, by its holding the Court of Appeals for the Second Circuit would require this of the stevedore-contractor.

Common sense dictates that, met with a condition of a cargo having shifted during an Atlantic crossing, a stevedore must use reasonable care in discharging such a cargo. Here, the trier of the facts found that the stevedore's op-

eration was a proper one and was attendant with reasonable care.

In reversing, the Court of Appeals has made no mention of these findings, has not held them to be clearly erroneous, and has awarded indemnity as a *matter of law*. It has therefore held that the stevedore is liable *irrespective of an absence of negligence*.

This is directly contrary to what has been actually held by the Court of Appeals for the Ninth Circuit in *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Co.*, 310 F. 2d 481, certiorari granted April 15, 1963. If this Court were to deny certiorari in the case at bar and then affirm the decision of the Court of Appeals for the Ninth Circuit in the cited case the petitioner herein would have been held liable on a theory which this Court had disavowed. These inconsistent results can be obviated, it is respectfully submitted, by a consideration of both cases at the same time.

In not adverting at all to the findings of fact, made by the trier of the facts, the Court of Appeals for the Second Circuit stands opposed to the Court of Appeals for the Fifth Circuit in *Cia Maritima del Nervion* v. *James J. Flanagan Ship. Corp.*, 308 F. 2d 120, where the Court in a non-jury case said (p. 123):

> "But the stevedore is not an insurer or guarantor of any and all accidents which may result in injury to a longshoreman working on the vessel. The stevedore's negligence which breaches his warranty of workmanlike performance is a question of fact, to be decided by the trier of fact, and it cannot be redetermined by this court unless it is manifestly against the weight of the evidence. See Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413

(1959); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962). See also, Norris, The Law of Maritime Personal Injuries (1959) 55, p. 152. On the record before us, we cannot hold that the District Court 'clearly erred in finding that 'in performing its stevedoring services aboard M/V Mar Tirreno on the occasion in question, Flanagan acted in a safe, reasonable and workmanlike manner and in all respects complied with the standard of performance which it impliedly warranted under its agreement with Nervion.'"

It would also appear that in these maritime cases the Second Circuit has viewed proximate cause as a question of fact, *F. E. Grauwiller Transportation Co., Inc.* v. *Gallagher Sand & Gravel Corporation*, 153 F. 2d 384, 385 and on other occasions has viewed that question as a matter of law. *Reddick* v. *McAllister Lighterage Line*, 258 F. 2d 297, and this case, p. 416 of 311 F. 2d.

In a field of law which is essentially judge-made (*The Tungus* v. *Skovgaard*, 358 U. S. 588, 611, 79 S. Ct. 503, 516; *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550, 80 S. Ct. 926, 933) there should be substantial uniformity for many reasons.

Longshoremen, their Unions, shipowners, their underwriters, stevedores and their underwriters are presently involved in this hydra-headed litigation. The industry as a whole sits in a cockpit of confusion. It looks for help from this Court to establish the law to govern all Circuits. The situation which presently exists cannot long endure.

3. The instant decision is contrary to holdings and principles which have enunciated by this Court.

After the implied warranty of workmanlike service had been enunciated by this Court in *Ryan Stevedoring Co. Inc.* v. *Pan Atlantic S.S. Corp., supra,* this Court held in *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., supra,* that whether the stevedore rendered a substandard performance was a question of fact for the trier of the fact (cf. *McNamara* v. *Weichsel Dampschiffahrt*, 293 F. 2d 900). In the cited cases it was the jury.

Again in 1962 this Court in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 82 S. Ct. 780, rearticulated that questions of fact as to the stevedore's quality of performance of its services were for the jury and that Courts of Appeal could not redetermine them.

If that be true in jury cases, what is the rule where the third party complaint is tried by the Court alone as the trier of the facts? It would seem that in non-jury cases the "clearly erroneous" rule should be applied. *Guzman* v. *Pichirilo*, 369 U. S. 698, 702, 82 S. Ct. 1095, 1098. *U. S.* v. *National Assoc. of Real Estate Boards*, 339 U. S. 485, 70 S. Ct. 711; *McAllister* v. *U. S.*, 348 U. S. 19, 75 S. Ct. 6.

If the claim for indemnity in the instant matter had been tried to a jury can there be any doubt that the Court under a proper charge would have had to submit the question of the petitioner's conduct and the quality of performance of its services to the jury. Its verdict would be unassailable under the *Atlantic & Gulf Stevedores* case, *supra.*

Now, where the very same factual issue has been presented to the Trial Court who had heard the witnesses on the subject and who had found as a fact that the stevedore acted reasonably and did a workmanlike job how can that

finding be any more open to attack than the jury's finding in the hypothetical case.

In both instances the findings would be of fact.

Yet we get inconsistent results in these cases. A question of fact exists in both situations, jury v. non-jury. Resolution of that factual issue, if supported by the evidence, is unimpeachable in one instance, jury trial, and is open to complete review in the other, non-jury trial.

In the case at bar District Judge Dimock held that the stevedore went ahead with the work despite an obvious dangerous condition, 311 F. 2d 413, 415. What was the petitioner to do? Could it tenably and with impunity say to the shipowner I will not work your ship because the cargo shifted on the voyage and my men will not have a smooth ballroom floor on which to walk, thus subjecting itself to a breach of contract action. Or, in conformity with this Court's decisions that the stevedore must do a workmanlike job, could it establish a procedure (a bucket brigade) which minimized the chance of injury except for the fact that a latent defect in one of the boards of a crate or case caused the longshoreman to be injured. *Neither* the condition of a shifted cargo *nor* the latent defect in the case had been *caused* or *created* by the stevedore.

If the Court below is correct it makes no difference what the stevedore's conduct is in face of a dangerous condition. Its mere continuance to stevedore the vessel renders it liable as a matter of law.

Indemnity then becomes automatic.

Surely this is not what this Court said in the landmark cases, *supra*, nor did it intend that result which has been arrived at by lower courts with unthinking facility.

The test is, or should be, we submit, what did the stevedore do in light of the dangerous condition.

Indeed, as has been said in *Longshoreman-Shipowner-Stevedore: The Circle of Liability*, 61 Michigan Law Review, No. 3, January 1963, pp. 539, 563:

> "The stevedore now ultimately bears the risk in case of injury to his longshoreman-employee unless the injury is caused solely by the shipowner's negligence or an unseaworthy condition of the vessel to which the stevedore cannot be connected in any way."

This petition cries out for a restatement of basic rules and commends itself to this Court's favorable consideration.

4. Who should bear the loss—how to avoid risk of injury to longshoremen.

It cannot be gainsaid that stevedoring is an hazardous occupation. It is fraught with all kinds of perils.

If we are concerned with the protection of longshoremen from injury and not with compensation for disabling and crippling injuries then a form of social justice and persuasions must be taken into account.[5] What has been said in the footnote applies to shipowners as well. It has been articulated by the Court of Appeals on several occasions within the recent past.

In *Reddick* v. *McAllister Lighterage Line*, 258 F. 2d 297, the Second Circuit in a factual situation, highly com-

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[5] In 19 NACCA Law Journal 29, the author says:

"Tort law also serves a proper prophylactic purpose by bringing about a prevention of accidents. Where a habitual defendant causes serious and permanent harm, imposing liability with an adequate award will tend to make employers more careful as to those they employ and in taking safety measures, e.g., in plant and manufacturing and inspection processes, so as to reduce the likelihood of disabling accidents. This is the preventive function of tort law, subsidiary to its fundamental function of compensating for harm."

parable to the one at bar, said in a Per Curiam opinion denying rehearing and holding the shipowner liable (p. 303):

> "The vastly extended scope of the warranty of seaworthiness under recent Supreme Court decisions has already shifted the stevedore's loss. The humanitarian objective of those decisions will not be furthered by judicial decisions which shift the stevedore's loss from one underwriter to another. And so we leave the loss on McAllister (and its underwriters) being convinced that under the doctrine of causation and foreseeability in the field of contracts that is where the loss belongs. Corbin on Contracts, Vol. 5, §1006 et seq."

See also *De Gioia* v. *United States Lines Company*, 304 F. 2d 421, where the shipowner was granted indemnity.

Most recently, in denying the shipowner's claim for indemnity (on an express contract of indemnity), the Second Circuit said in *Ferrigno* v. *Ocean Transport Ltd.*, 309 F. 2d 445, 446:

> "Since Pittston (the stevedore) was *found* to have satisfied its warranty of workmanship, there is nothing that it could have done in this case to minimize the risk, which, as the trial court found, was the sole result of the shipowner's negligence. So shifting the loss to the stevedore would seem to decrease the shipowner's incentive to make his vessel safe." (Parenthetical matter and italics supplied.)

In the case at bar there was nothing petitioner could have done to minimize the risk. Indeed, it also was *found* by the trier of the facts to have satisfied its warranty of workmanlike service.

Yet the *only* way it could have avoided the accident, actually caused by a latent defect in a case, was not to have stevedored the vessel at all and become liable for breach of contract.

Allocation of risk, loss and injury to longshoremen can only be achieved if shipowners are held not to be entitled to indemnity where the facts warrant that finding.

A decision like the one under consideration, if allowed to remain, would make for shipowners being more careless, comfortable in the realization that any damages for unseaworthiness of a vessel, not created in any degree by the stevedore, would result in indemnity and counsel fees being awarded against the stevedore. Thus, ship's personnel would not have to concern themselves with the integrity of any stow or the negligent method of a loading operation at a foreign port knowing that any injury at the port of discharge would result in "automatic" indemnity against the discharging stevedore.

Carelessness of ship's personnel and unseaworthiness of the vessel and its gear would run rampant. Yardsticks to measure the stevedore's conduct would be discarded. The stevedore, who had assumed that he would be subject to limited liability to his injured longshoreman, by virtue of the Longshoremen and Harbor Workers' Compensation Act of 1927, would become the insurer of all delinquencies of the shipowner irrespective of the stevedore's conduct. A stevedore would be liable without fault which is certainly contrary to the considerations which have shaped our maritime law of implied indemnity. The considerations which prompted the aforesaid Compensation Act and Rule 14(a) F. R. C. P. would be barren promises to the ear.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 29, 1963

APPENDIX

District Court Opinion

Civ. No. 16091

MICHAEL CAPUTO,

Plaintiff,

—v.—

UNITED STATES LINES COMPANY,

Defendant and Third Party Plaintiff,

—v.—

IMPARATO STEVEDORING CORP.,

Third Party Defendant.

BRUCHHAUSEN, *C.J.*

The plaintiff, a longshoreman, employed by the third party defendant, Imparato Stevedoring Corporation, sustained injuries on December 3, 1954, while engaged in unloading cargo from the No. 1 lower hold of the SS. *American Ranger*, owned by the defendant, United States Lines Company, hereinafter called the shipowner. He claimed that the accident and the resulting injuries were caused by the unseaworthiness of the vessel and the negligence of the shipowner. The jury rendered a verdict in favor of the plaintiff and against the shipowner in the sum of $70,000. The shipowner claims indemnification from the stevedore.

Witnesses testified that when the hatch was opened at approximately 8 A. M. on that day they viewed the cargo in disarray and that the crates were of uneven size, also some smaller pieces of cargo were stowed in between the larger crates. There was also testimony that some of the crates were wobbly. The hatch boss was informed of the condition and he told the men "to do the best you can." The longshoremen engaged in a bucket brigade operation whereby cargo passed from hand to hand until it reached the square of the hatch for lifting from the hold. There was also testimony that during the three and a half hour period, prior to the accident, the men engaged in removing the cargo observed that no dunnage was used for flooring. Testimony disclosed that the main purpose of dunnage is to insure a dry cargo and that this type of cargo does not necessarily require dunnage for proper stowage. The plaintiff testified that he picked up a box weighing approximately forty pounds, turned around to pass it to the next man in his gang when suddenly one of his feet broke through the top of a crate and he was injured.

As previously stated the question presented to the Court is whether the shipowner is entitled to indemnification from the stevedore.

The Supreme Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 held that a stevedore warrants to a shipowner that it will do its job in a workmanlike manner and with reasonable safety and that any loss from this breach should be borne by the stevedore. The parties did not execute a formal contract. The Court held at page 133:

> "It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."

In *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563, the Court extended the obligation of the stevedore to perform its duties with reasonable safety not only to the handling of the cargo as in the *Ryan* case, but also to the use of equipment of the vessel incidental thereto. The jury found the shipowner negligent, however, this did not in and of itself deprive the shipowner of indemnification because the obligations of the shipowner to the longshoreman are not identical with those of the stevedore to the shipowner. In remanding the action for a more specific finding, the Court at page 568 stated:

> "While the jury found petitioner 'guilty of some act of negligence,' that ultimate finding might have been predicated, *inter alia*, on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under Ryan, prevent recovery by petitioner in the third-party action."

The Court further held at page 569:

> "* * * in the area of contractual indemnity an application of the theories of 'active' or 'passive', as well as 'primary' or 'secondary' negligence is inappropriate. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., *supra*, at 132-133."

In *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423, a longshoreman was injured when a boom fell and

struck the plaintiff. The equipment was in good condition. The winch, which served the boom, had a cut-off device to shut off the current at three tons, which was also the safe working load of the boom. The circuit breaker had been set to operate at a load slightly more than six tons before the winch was turned over to the stevedore. The Court found that the unskillful handling of the winch by the stevedore was the primary cause of the parting of the topping-lift and fall of the boom. The shipowner was entitled to indemnification although a defective cut-off device was furnished the stevedore.

In *Calmar Steamship Corporation* v. *Nacirema Operating Company*, 266 F. 2d 79, a defective cargo light was furnished the stevedore who accepted it, and threw it into the hold not properly "seized", meaning secured, which fell injuring the longshoreman. The jury found both shipowner and stevedore negligent and the unseaworthiness of the ship to be the proximate cause of the accident. The Court holding that any claim over could not be other than contractual, cited *Ryan* and *Weyerhaeuser*, and, at page 80 wrote:

> "The court said that a service contract such as the one here involved implies a promise by the expert stevedore to perform 'with reasonable safety' and that this obligation relates not only to the handling of cargo, as in Ryan, but to the use of equipment incidental thereto, as in Weyerhaeuser. The District Court then held that the manner in which Nacirema had used the cargo light constituted a breach of this contractual duty."

In *Lamazza* v. *United States*, 190 F. Supp. 692 (S. D. N. Y. 1960) both the shipowner and stevedore foreman knew of the condition of the gangway two and a half hours prior

to the accident. Neither shipowner nor stevedore corrected the condition prior to the accident. The Court held the stevedore negligent in failing to correct the condition and, therefore, pursuant to the contract liable over to the government for the sum it was required to pay the longshoreman.

In *Beard* v. *Ellerman Lines, Ltd.*, 289 F. 2d 201, a longshoreman was injured during unloading operations. The jury found the shipowner Ellerman negligent in not providing the longshoreman a safe place to work, and such failure constitutes negligence. The Court after discussing the authorities, held at page 207:

> "Under the principles above stated, the 'warranty of workmanlike service to perform the obligations of the contract with reasonable safety', extends to the handling of the cargo, and thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to 'handle' the cargo in the unsafe place to work.
>
> "It was Atlantic's conduct in proceeding to unload cargo in an unsafe place to work which 'called into play' the unsafe condition which prevailed, and under Crumady v. The Joachim Hendrik Fisser, *supra*, it breached its warranty to Ellerman."

The Court further held at page 207 after citing *American President Lines, Limited* v. *Marine Terminals Corp.*, 9 Cir., 1956, 234 F. 2d 753, 759, 760, certiorari denied 352 U. S. 926:

> " • • • We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was

fully informed of the fact and of the possible consequences of the shipowner's negligence * * * and in face of all that proceeded to breach its duty so as to make that negligence an immediately dangerous force * * * [I]t was the stevedore's breach of duty that created the danger and made it an active condition with immediately foreseeable consequences of personal injury."

The Court went on to state at page 207:

"The 'expertise' of Atlantic in the handling of cargoes should have made it aware of the dangers inherent in discharge of the Philadelphia bales in view of the presence of the New York stow. If a jury could 'properly find', as Atlantic urges, that Ellerman was negligent in permitting the discharge under the circumstances which prevailed, because of their obvious dangers, it certainly follows that Atlantic, an expert in the field of handling cargo, should have shown an awareness of the situation and taken steps to avoid that which happened or refused to proceed with the discharge of the cargo until the site of discharge was made 'a safe place to work.'"

In *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82, a longshoreman was injured due to a defective winch. The shipowner and stevedore knew of the defect. The Court held that a shipowner supplying defective equipment will not necessarily bar him from recovery on his indemnity contract. The action being in contract depends upon whether his conduct has been such as to preclude recovery over against the stevedore, and not whether the shipowner was found negligent as to the longshoreman.

In *Parenzan* v. *Iino Kaiun Kabushiki Kaisha*, 2 Cir., 1958, 251 F. 2d 928, the longshoreman was injured due to

defective dunnage which broke under his weight. Shipowner and stevedore were aware of this condition. The shipowner was entitled to indemnification from the stevedore. The Court held at page 930:

> " * * * With knowledge of the defective condition of the stow, the stevedoring company continued the unloading without taking corrective measures, and its negligence was the proximate and primary cause of the injury to Parenzan. American President Lines v. Marine Terminals Corp., 9 Cir., 1956, 234 F. 2d 753."

The Court further held at page 930:

> "Moreover, the shipowner's complaint was phrased not only in terms of negligence but also in terms of a breach of warranty. Under the stevedoring contract the third-party defendant impliedly warranted to perform the work in a competent and safe manner. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 1956, 350 U. S. 124."

In *Huger* v. *Dampskisaktieselskabet International*, 170 F. Supp. 601, a longshoreman was injured during unloading operations due to improper placing of hatch beams and covers. The stevedore knew of this condition prior to the accident, but took no steps to correct the dangerous condition. The Court held that the stevedore breached its contractual obligation to discharge cargo in a workmanlike manner with reasonable safety and that such breach was the proximate cause of the longshoreman's injuries and the shipowner was entitled to recover indemnity from the stevedore. The stevedore represents himself to be the expert in loading and unloading cargo.

Smith v. *Jugoslavenska Linijska Plovidea*, 278 F. 2d 176; *Shannon* v. *United States*, 235 F. 2d 457; *Cook* v. *The M/V Wasaborg*, 189 F. Supp. 464; *Vladimir* v. *Johnson*, 1959 AMC 457; *Santomarco* v. *United States*, 277 F. 2d 255, and *Weigel* v. *The M/V Belgrano*, 188 F. Supp. 605 are in essence identical. In each of these cases the stevedore knew of the danger and either disregarded the condition or did nothing to remedy the danger. Under these circumstances the stevedore is bound to indemnify the shipowner under the warranty doctrine. The Appellate Courts have held that negligence alone of the shipowner may not preclude its recovery over against the stevedore. In all the decided cases to date no court has defined what conduct of a shipowner will bar a recovery over against the stevedore.

Unquestionably in this circuit a plaintiff may recover for injuries sustained due to a latent defect in a board constituting part of a ship's cargo. *Reddick* v. *McAllister Lighterage Lines*, 2 Cir., 1958, 258 F. 2d 297; *Carabellese* v. *Naviera Aznar, S. A.*, 2 Cir. 1960, 285 F. 2d 355.

In *Reddick* v. *McAllister Lighterage Lines, supra*, a longshoreman was injured when a board of a wooden case collapsed due to the weight of the plaintiff when he stepped on a "blind board" one seemingly solid but latently defective. It was also found that there was no dunnage between the crates and in order to unload them, the longshoreman had to mount the crates and use a crowbar to separate them, so that slings could be passed around them for hoisting onto the pier. The Court found the vessel unseaworthy due to improper stowage and, therefore, liable to the longshoreman. In denying recovery over it held in part:

> "However, even if it was properly found that Clark by improper stowage breached its implied warranty of workmanlike service to McAllister, a majority of the court thinks there is no showing that this breach

cause Reddick's injury. The Ryan case, supra, and the recent case of Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491, indicate that when dealing with contractual indemnity in this type of situation the application of tort theories of liability, i.e., 'active' or 'passive' and 'primary' or 'secondary' negligence, is inappropriate. Under the general test of foreseeability applied to contractual liability, the breach must have been the cause of the injury. We think that in this case the latent defect in the board on the top of the crate was an intervening cause which broke any causal chain that might otherwise have existed. The only result of improper stowage was to cause a man to walk on top of the cases and use a crowbar to pry them apart. If Reddick had been injured while trying to climb to the top of the crates, his injury might have been the foreseeable result of improper stowage and Clark in that event would have been liable over to McAllister. But Clark would not necessarily be liable for every conceivable mishap that Reddick might have encountered while on top of the crates. The evidence in this record indicates that the tops of these crates were made of pine boards which were between 1 and 1½ inches thick. It was also shown that longshoremen frequently walked along the top of these crates without using dunnage boards and, indeed, an expert testified that dunnage boards are never used on the tops of these crates when unloading. If the crate to be moved is obviously weak and damaged the longshoreman stands on adjoining crates. There is nothing in this record to indicate that a 1-inch pine board was incapable of supporting the weight of a longshoreman if the wood was in good condition. Thus, we conclude, that, even assuming proof of Clark's improper stow-

age, Reddick's injury was due to defects in the crate not foreseeable by Clark and hence not caused by improper stowage."

Subsequently the Court of Appeals for this Circuit in *Carabellese* v. *Naviera Aznar, S. A.*, 285 F. 2d 355 (1960) reaffirmed the *Reddick* holding when it stated in part at page 359:

"In Reddick v. McAllister Lighterage Line, Inc., 2 Cir., 258 F. 2d 297, 299, certiorari denied 1958, 358 U. S. 908, 79 S. Ct. 235, 3 L. Ed. 2d 229, where again the injury was in the course of unloading, the majority held that unseaworthiness could be predicated not only on improper stowage, as in the cases just cited, but also upon a latent defect in a cargo crate which gave way when the plaintiff longshoreman stepped upon it. However, the majority noted that the crate had been in the owner's 'exclusive possession and control for the two days preceding the accident.' Since there was no evidence that the owner had known or could have known of the latent defect, this must have been designed to bring out that the crate had in effect become a part of the working surface supplied to the longshoreman, so that the owner would be liable for a latent defect in the crate as he would for one in the deck or even, as was held in Grillea v. United States, 2 Cir., 1956, 232 F. 2d 919, for a misplaced cover which the injured longshoreman had himself installed over part of a hatch. The same principle underlies Rich v. Ellerman & Bucknall S. S. Co., 2 Cir., 1960, 278 F. 2d 704. That, like the instant case, related to an injury sustained in loading, but the unseaworthiness lay in the stowage of truck chassis previously loaded which turned out to afford an unstable footing. Thus the chassis in Rich, like the crate in Reddick and the

> hatch cover in Grillea, had become, as was said in the Grillea case at p. 923, 'as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.'"

As previously mentioned, in the case at bar the shipowner claims indemnity against the stevedore. A question presented for consideration is the duty or obligation of the stevedore to discover a latent defect.

In *Ignatyuk* v. *Tramp Chartering Corp.*, 2 Cir., 1957, 250 F. 2d 198, it appears that a rope parted due to a latent defect which could not have been detected by a cursory examination. Judge Medina writing for the Court, stated at page 201:

> "The claim of indemnity here stems from the contract. We hold that an implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessel being loaded or unloaded which are not obvious upon a cursory inspection. See Seas Shipping Co. v. Sieracki, 328 U. S. 85, 95, 66 S. Ct. 872, 877, 90 L. Ed. 1099; Shannon v. United States, 2 Cir., 235 F. 2d 457; Gucciardi v. Chisholm, 2 Cir., 145 F. 2d 514; Liverani v. John T. Clark & Son, 231 N. Y. 178, 131 N. E. 881. The seaworthiness of the vessel is a quite different matter and so is the duty of the shipowner to provide a safe place to work."

In *Pena* v. *A/S Dovrefjell*, 176 F. Supp. 677, Judge Sugarman in denying a claim over stated:

> "[A]n implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment fur-

nished by the vessel being loaded or unloaded which are not obvious upon a cursory inspection."

In *Yost* v. *General Electric Company,* 173 F. Supp. 630, (S. D. N. Y., 1959), the Court held:

> "On the issue of implied warranty of workmanlike performance we are satisfied that the slight visual inspection and examination of the chain by the employees of O'Brien, in addition to the suspension test that was made by them, would be sufficient to satisfy the duty owed by O'Brien inasmuch as they were not the suppliers of the equipment and to some extent were entitled to rely on the implied representation of the shipowner. That would defeat the claim of the United States for indemnity-over against it. See Ignatyuk v. Tramp Chartering Corp., 2 Cir., 1957, 250 F. 2d 198, 201; see, too, Liverani v. John T. Clark & Son, 1921, 231 N. Y. 178, 131 N. E. 881."

In the cases cited by the shipowner, indemnity was allowed against the stevedore upon the ground of breach of the warranty of performance of workmanlike service coupled with evidence that such breach was the proximate cause of the injury and the danger was known or should have been known to the stevedore who failed to take proper precautions to alleviate the danger.

The holding in the *Reddick* case, *supra,* is applicable to the case at bar. The *Ryan* case is not in conflict.

The credible evidence is that the ship was loaded in Belgium; that from Europe it crossed the North Atlantic during November and encountered heavy seas; that it just docked at Boston, then at the Brooklyn Army Base where the accident occurred; that the No. 1 hatch was opened; that the longshoreman viewed the cargo in disarray; that the wooden crates were of uneven size, some of them wobbly;

that the hatch boss, when apprised of this condition instructed the gang "to do the best you can"; that no dunnage was used for flooring; that the gang had to walk on top of the crates; that it was proper procedure during unloading to walk on top of this type of cargo; that the stevedore, having knowledge of this condition ordered the men to continue unloading; that they formed a so-called bucket brigade to avoid much walking over the cargo and permit the lead-man to pick up a piece of cargo, turn around, take no more than two or three steps prior to handing the piece of cargo to the next man in the brigade who in turn passed it on to the next man; that the unloading continued for three and a half hours prior to the plaintiff's accident; that no other incident occurred subsequent thereto. The plaintiff's foot broke through a thin veneer case which he had walked upon prior to the accident.

Under these circumstances, there was no breach of the stevedore's warranty of performance of workmanlike service. The longshoreman faced with a condition of wobbly stowage acted reasonably in forming the bucket brigade to eliminate as much activity as possible.

The cargo was in the possession of the shipowner from the time it left Europe. There was no notice given by the shipowner to the stevedore concerning any latent defects in the wooden crates. There is no rule in this circuit requiring the stevedore to minutely examine apparatus or equipment for latent defects. If the improper stowage were the sole cause of the injuries then unquestionably the stevedore may be held liable for breach of warranty of workmanlike service. The accident might then have been the foreseeable result of improper stowage. As stated in the *Reddick* case, *supra*, "Under the general test of foreseeability applied to contractual liability, the breach must have been the cause of the injury. We think that in this case the latent defect in the board on the top of the crate was an intervening

cause which broke any causal chain that might otherwise have existed." In the case at bar, the only result of improper stowage was to cause the gang to set up the bucket brigade. The plaintiff's injuries were due to the latent defect in the crate, not foreseeable by the stevedore and hence not caused by improper stowage.

The shipowner has failed to establish its indemnity claim against the stevedore.

Settle decree on notice.

WALTER BRUCHHAUSEN
Chief Judge

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 153—October Term 1962

(Argued December 3, 1962 Decided January 2, 1963)

Docket No. 27663

MICHAEL CAPUTO,

Plaintiff-Appellee,

against

U. S. LINES COMPANY,

Defendant, and Third-Party Plaintiff-Appellant.

and

IMPARATO STEVEDORING CORPORATION,

Third-Party Defendant-Appellee.

Before:

SWAN and FRIENDLY, *Circuit Judges,*
and DIMOCK, *District Judge.*

Appeal from the United States District Court for the Eastern District of New York, Bruchhausen, Chief Judge.

From a judgment in favor of plaintiff and denying indemnity against third-party defendant. Defendant third-party plaintiff appeals. Affirmed in part. Reversed in part and remanded.

KIRLIN, CAMPBELL & KEATING, *Attorneys for Defendant-Appellant*, Joseph M. Cunningham, Vernon S. Jones and Henry J. O'Brien, Of Counsel.

MONICA & FEURY, *Attorneys for Third-Party Defendant-Appellee*, Joseph P. Feury and Thomas H. Healey, Of Counsel.

JACOB D. FUCHSBERG, *Attorney for Plaintiff-Appellee.*

DIMOCK, *District Judge.*

This is an appeal by defendant and third-party plaintiff, United States Lines Company, hereinafter the shipowner, from a judgment which awarded $70,000 to plaintiff upon the verdict of the jury and which dismissed its third-party complaint against third-party defendant, Imparato Stevedoring Corporation, hereinafter stevedore.

The action is one brought by a longshoreman to recover for personal injuries sustained when his foot broke through a thin panel of a packing case while he was taking part in the unloading of a cargo of wooden cases and open crates from the SS American Ranger. Defendant was the owner and operator of that vessel. Third-party defendant was the stevedore contractor which was unloading the vessel pursuant to a contract with the United States of America. The shipowner filed a third-party complaint claiming indemnity from the stevedore.

The action by the longshoreman against the shipowner was tried to a jury. The third-party action was tried to the trial court alone. The trials were simultaneous except that the court, over objection by the shipowner, took additional expert testimony after the trial before the jury.

The principal point raised by the appeal is the shipowner's contention that the issue of the shipowner's right to indemnity was concluded in the shipowner's favor by the verdict of the jury and that the trial court therefore erred in dismissing the shipowner's third-party complaint.

The court made formal findings to the effect that the longshoreman was caused to fall when his foot broke through a thin veneer case which contained a board which was apparently sound but was in fact latently defective and that the sole cause of the longshoreman's accident was the latent defect.

It is the shipowner's contention that the issue of the existence of a latent defect was not submitted to the jury and that the jury's verdict for the plaintiff was based solely upon the longshoreman's claim that the cargo was improperly stowed in that no dunnage was used.

The point is crucial. The testimony was that the allegedly dangerous condition of the stowage was obvious and that the stevedore nevertheless went ahead with the work. This would constitute a breach of the stevedore's warranty to the shipowner of safe performance of the work and render the stevedore liable for indemnity. *De Gioia* v. *United States Lines Company*, 2 Cir., 304 F. 2d 421. On the other hand, if the accident was caused by a latent defect in the packaging of the cargo, there would have been no breach of the stevedore's warranty and no obligation to indemnify the shipowner. *Ignatyuk* v. *Tramp Chartering Corp.*, 2 Cir., 250 F. 2d 198.

The longshoreman's counsel in his opening made no claim of a latent defect in the packaging of the cargo. He

said that the longshoremen found the cargo in a topsy-turvy condition without any dunnage to brace the cargo or to supply a walk-way. He added, "We don't say that it was proper or improper to package this merchandise in these kinds of crates. We have no concern. As far as we are concerned, they could put it in cardboards, but we do say if this kind of merchandise is being shipped, then a certain kind of dunnage should also be provided."

Counsel for the shipowner in his opening said, "Well, if there was no dunnage in this cargo it was improperly stowed. Let's stop all the questions about that."

The longshoreman plaintiff testified that the cargo was unstable and that the wobbling of a packing case caused him to step on a panel of veneer which otherwise would not have been used as a place to stand on and that the panel gave way and caused his injury. There was no testimony that the insubstantial character of the veneer was not apparent. Indeed, one of the witnesses who was working with the longshoreman said that he thought plaintiff did not see the thin veneer or forgot about it.

The shipowner introduced evidence that the cargo was properly secured by dunnage.

The court charged that the plaintiff claimed:

> "that he did not have a safe place to work, that through the failure of the shipowner to properly stow the cargo and to furnish dunnage, a case on which he was standing tilted, causing him to lose his balance and put his foot through the thin veneer-like plywood covering on the case on which he was standing; that he twisted and fell using the case he was using as support, and sustained injury."

And the court added immediately:

> "The defendant denies there was lack of dunnage, and denies that the accident occurred under the cir-

cumstances the plaintiff claims. If you find that the accident did not occur in the manner claimed by the plaintiff, your verdict should be for the defendant."

The court's description of plaintiff's claim in its charge limited the claim to the failure to stow the cargo properly and to furnish dunnage. There was no reference in the description of plaintiff's claim to any defect in the packing case on which the plaintiff was standing nor was there reference to any such defect in any other part of the charge.

The verdict of the jury, though general, could have been based only upon the theory of improper stowage of the cargo.

The court, however, over objection of the shipowner, took additional expert testimony in opposition to the shipowner's claim for indemnity and made the finding above referred to that the sole cause of the accident was the latent defect in the packing case that plaintiff broke through.

There is thus squarely raised the question of law whether, when the principal claim is tried to a jury and the third-party plaintiff's claim for indemnity is tried to the court, the court is bound by the verdict of the jury. There can be but one answer to this question. One of the purposes of Rule 14(a) of the Federal Rules of Civil Procedure which allows the bringing in of a third-party defendant is to make the evidence adduced by the plaintiff against the defendant available as a basis for the claim of the third-party plaintiff against the third-party defendant. Inconsistent determinations based upon the same evidence at the same trial are logically impossible. The court must follow the verdict of the jury. *Knell* v. *Feltman*, D. C. Cir., 174 F. 2d 662, 665; *Drago* v. *A/S Inger*, 2 Cir., 305 F. 2d 139, 141.

If a special verdict under Rule 49(a) F. R. Civ. P. had been rendered in this case, the question of inconsistency

between the verdict of the jury and the judgment of the court on the third-party claim could have been solved by inspection. Here the question is a little more difficult because of the necessity of examining the record in order to determine what issues were concluded by the general verdict of the jury. See *Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316, 329. The fact that in the court's charge it stated that the plaintiff's claim was that, through the failure of the shipowner properly to stow the cargo and furnish dunnage, the packing case on which he was standing tilted and that, if the jury found that the accident did not occur in the manner claimed by the plaintiff, the jury's verdict should be for the defendant leaves no room for doubt as to the basis of the jury's finding of liability. That basis was the failure of the shipowner properly to stow the cargo and furnish dunnage. The court's finding that the accident was due to a latent defect in a packing case must be disregarded and the judgment, so far as based thereon, cannot stand.

Though defendant shipowner has appealed from the entire judgment, no serious attack has been made on the verdict of the jury in favor of plaintiff longshoreman in the sum of $70,000 and, to that extent, the judgment must stand.

Plaintiff-appellee raises a question with respect to interest upon the judgment. It appears that, on November 6, 1961, upon the rendition of the verdict of the jury for $70,000 but before the determination by the court of the third-party claim, a clerk's form of judgment for the sum of $70,000 in favor of plaintiff and against defendant shipowner was entered.

On March 20, 1962, however, a final order and judgment was entered vacating as premature the judgment earlier entered upon the verdict and adjudging that plaintiff recover from defendant shipowner the sum of $70,000

and costs and that the third-party complaint be dismissed with costs to be taxed. Plaintiff argues that we should direct that his judgment for $70,000 should bear interest from November 6, 1961, the date of the entry of the original judgment on the verdict.

On its face, the judgment of March 20, 1962 would bear interest only from its date so what plaintiff asks is that it be modified to provide that it should bear interest from November 6, 1961. Passing the question whether plaintiff who has not appealed from the judgment of March 20, 1962 is entitled to have it modified, plaintiff's position is without merit. The judgment of November 6, 1961 was prematurely entered in the light of Rule 54(b) F. R. Civ. P., which provides: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.". There was no such direction and determination in this case. There is thus no reason why this court should award interest from November 6, 1961 as though the judgment of March 20, 1962 had been entered as of the date of the premature judgment.

The judgment is reversed insofar as it provides that the third-party complaint be dismissed with costs to be taxed and the case is remanded to the District Court with directions that that Court determine the damages of defendant and third-party plaintiff including its reasonable attorneys' fees incurred in defending against plaintiff's claim and that that Court further modify the judgment so as to provide that third-party plaintiff recover the amount so determined from third-party defendant. The judgment is otherwise affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1069.

IMPARATO STEVEDORING CORPORATION,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT UNITED STATES LINES COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1069.

IMPARATO STEVEDORING CORPORATION,
Petitioner,

v.

UNITED STATES LINES COMPANY,
Respondent.

BRIEF OF THE RESPONDENT, UNITED STATES LINES COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

STATEMENT.

The petition is merely another effort by a stevedore contractor to avoid the responsibility to take reasonable efforts to avoid injury to its own employees. To avoid this legal responsibility, the stevedore really seeks the overruling of the cases of *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corporation*, 350 U. S. 124 (1956); *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Crumady* v. *Joaquin Hendrik Fisser*, 358 U. S. 423 (1959); and *Waterman Steamship Corporation* v. *Dugan & McNamara*, 364 U. S. 421 (1960).

The real issues involved have been masked in the petition by creating questions which are said to contain the problems which this Court is asked to review but which only represent

straw-men patched together by the Petitioner to create the illusion that the issues decided are unusual and important and, therefore, warrant examination by this Court.

That the "questions presented" in the petition do not actually contain the "problems" which a review of this case would entail, nor those issues decided by the Courts below, is easily verified by a reference to the opinion of the Court of Appeals (311 F. 2d 413 (1963)). The failure of the Petitioner to make any reference to the only problems involved is an obvious admission that they were decided correctly below and that they do not warrant examination by this Court.

The issue of Stevedore liability decided by the Court of Appeals in this case has actually been decided in the same way by several other Courts of Appeal. In fact, no Court of Appeal, nor any District Court has written an opinion contrary to the holding of the Court of Appeals on the issue of stevedore responsibility. It is very understandable, therefore, why the Petitioner has refused to make a frank statement of the issues.

The Questions Involved in this Case and Decided Below.

The Petitioner does not dispute the holding by the Court of Appeals (*Caputo* v. *U. S. Lines*, 311 F. 2d 413, 415) that, implicit in the jury verdict which found against the shipowner in the primary action was a finding that the plaintiff was injured because improperly stowed cargo in the defendant's vessel created a hazardous working condition and, therefore, an unseaworthy vessel.

This cargo consisted of cases and crates containing United States Air Force general cargo and household goods of Air Force personnel stowed at Cairn Ryan, Scot-

land, by stevedores employed by the Transportation Corps of the British Army, acting as agents of the United States Air Force. The plaintiff claimed that this cargo had not been chocked on being stowed, nor had there been the usual dunnage boards laid between the tiers of cases and crates of which this cargo was composed, as a result of which the plaintiff longshoreman discharging the cargo had no safe walking surface.

The plaintiff and his fellow longshoremen testified that when the No. 1 lower hold was opened, the cargo was "topsy turvy". It looked as if it had been "thrown in", rather than stowed. They called this hazardous working condition to the attention of their supervisor,—also employed by the stevedore. He stayed on the main deck, made no inspection of the cargo to ascertain whether the working conditions were hazardous, but merely answered the longshoremen's complaints by advising that they "do the best you can". The longshoremen testified that, during the discharge of the cargo until the plaintiff was injured, the jumbled stow made the working conditions dangerous.

From the very first pleading in the prime case against the shipowner, throughout the entire trial of the action, and the instruction to the jury by the District Court Judge, there was no reference made to any cause of the accident except the hazardous working condition because the plaintiff was required to work on tilting, wobbly cargo cases, which did not have any dunnage across the top of the cases, and which, therefore, required that the plaintiff walk on thin "veneer-like" casing which would not support the weight of a man. The theory of the plaintiff's case,—and the facts which were put before the jury—was that he, and his co-employees actually attempted to avoid stepping on the "paper-thin" veneer cargo case, but, in view of the fact that there were no dunnage boards on top of the cargo;

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and, in view of the fact that the cargo was wobbly and tilted, the plaintiff lost his balance, which caused him to miss his step and injure himself by putting his foot through a "paper-thin" veneer cargo casing.

The petition does not ask this Court to review the holding of the Court of Appeals that the findings of fact implicit in the jury verdict were binding upon both the Trial Court and the stevedore; nor the holding that implicit in the jury verdict was a finding that the plaintiff was injured by an obviously hazardous working condition of which the stevedore had notice. The Petitioner, therefore, must also admit that it was error for the District Court Judge iat r to find that "the plaintiff's injuries were due to the latent defect of the crate, not foreseeable by the stevedore, and, hence, not caused by improper stowage" (202 F. Supp. 600, Pg. 606). The District Court judge agreed that, if the plaintiff's injury was caused by a hazardous working condition created by improperly stowed cargo, then the stevedore-contractor would have breached its warranty of workmanlike service, because, under the established law, the stevedore had the responsibility to make the decision,—as an expert in the discharge of cargo from vessels—how best to remedy the hazardous working condition; and, if its decision was that the hazardous working condition could not be remedied, to stop its stevedoring activities until the hazard has been eliminated. The District Court opinion cited numerous cases in support of this rule of law and concluded:

> "If the improper stowage were the sole cause of the injuries then unquestionably the stevedore may be held liable for breach of warranty of workmanlike service. The accident might then have been the foreseeable result of improper stowage" (202 F. Supp. 606).

The District Court judge then erred in concluding that it was a latent defect in a cargo case, rather than the hazards of working on improperly stowed cargo which caused the accident. The Court of Appeals said on this point:

> "The court made formal findings to the effect that the longshoreman was caused to fall when his foot broke through a thin veneer case which contained a board which was apparently sound but was in fact latently defective and that the sole cause of the longshoreman's accident was the latent defect.
>
> "It is the shipowner's contention that the issue of the existence of a latent defect was not submitted to the jury and that the jury's verdict for the plaintiff was based solely upon the longshoreman's claim that the cargo was improperly stowed in that no dunnage was used.
>
> "The point is crucial. The testimony was that the allegedly dangerous condition of the towage was obvious and that the stevedore nevertheless went ahead with the work. This would constitute a breach of the stevedore's warranty to the shipowner of safe performance of the work and render the stevedore liable for indemnity. De Gioia *v.* United States Lines Company, 2 Cir. 304 F. 2d 421. On the other hand, if the accident was caused by a latent defect in the packaging of the cargo, there would have been no breach of the stevedore's warranty and no obligation to indemnify the shipowner. *Ignatyuk* v. *Tramp Chartering Corp.*, 2 Cir., 250 F. 2d 198."

The first of the "Questions Presented" in the petition asserts that indemnity was allowed against the stevedore although a finding was made by the District Court that it was not negligent, and consequently did not breach its warranty of workmanlike service. So-called "automatic" indemnity. The above excerpt from the opinion of the Court of Appeals clearly shows that no holding in the courts

below supports the assertion in the petition that such question was ever involved.

The Actual Questions Presented.

(1) Where a jury has found a shipowner liable to a plaintiff longshoreman for personal injuries resulting from an obviously hazardous working condition in the hold of its vessel,—which existed for hours prior to the accident—because of improperly stowed cargo, is that jury finding binding on a District Court judge who is called upon to decide the third-party action by the shipowner against the stevedore, when the finding of fact made by the District Court judge is based on the same evidence presented to the jury? Or may the shipowner be held liable to the plaintiff on a jury finding, which finding would also make the stevedore liable to the shipowner, both on the facts and law, and then be denied recovery against the third-party defendant-stevedore because the District judge refused to follow the jury findings but made contrary findings of his own, based on testimony on the same issues decided by the jury, but heard after the jury verdict and under which findings the shipowner may not recover indemnity.

(2) Does this Court agree with the opinions of the District Court and the Court of Appeals in this case, and with the numerous opinions by Courts of Appeal and District Courts that a stevedore breaches its warranty to a shipowner that it shall perform the stevedoring work, in which it is a recognized expert, in a safe manner by permitting its employees to work under hazardous working conditions, without taking any reasonable and effective steps to avoid injury to its own employees?

Reasons for Denying the Writ.

(a) *There is no Conflict Between the Circuits.*

The petition points out that this Court has granted certiorari to the Court of Appeals for the 9th Circuit in the case of *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 310 F. 2d 481 (1962), and that the present case has a problem which is "part and parcel" of the problem in the *Oregon Stevedoring* case. This statement is simply not so. In the *Oregon Stevedoring* case, the Court of Appeals for the Ninth Circuit held that a contracting stevedore which supplies a latently defective rope cannot be held liable on its warranty of workmanlike service, when the rope breaks due to that latent defect and causes injury to its longshoreman employee. The opinion of the Court of Appeals for the Ninth Circuit in the *Oregon Stevedoring* case is based on the theory that a breach of warranty of workmanlike service only may occur where the warrantor has been negligent and that, consequently, negligence of the Stevedore is a condition precedent to the breach of the warranty. [The holding by the Ninth Circuit in the *Oregon Stevedoring* case is directly contrary to the holding of the Court of Appeals for the Second Circuit in the case of *Booth Steamship Company, Ltd.* v. *Meier and Oelhaf Co.*, 262 F. 2d 310 (1958).]

In the present case, there was never any issue raised in the District Court, nor in the Court of Appeals, nor, indeed, in the Petition to this Court, that, if the injury to the plaintiff was caused by a hazardous working condition, it would not be negligent for the stevedore to permit its longshoremen to continue to work under such dangerous conditions. The only fact witnesses called by the third-party

defendant were called to establish that the cargo was properly stowed.

This testimony by the Stevedore sought to convince the jury that the plaintiff should not recover against the shipowner. After the jury found for the plaintiff, the stevedore then called upon an expert witness in an attempt to convince the trial court that the jury was incorrect and that the accident could not have happened as the plaintiff claimed and the jury found, but as a result of a latent defect in the top of a case.

The trial court based its finding on the testimony of the expert called after the jury trial was concluded. The Court of Appeals held that this was error.

In its briefs and argument to the Court of Appeals, the stevedore did not contest that, if it permitted its longshoremen to continue to work under conditions made hazardous by the condition of the cargo that it would then be guilty of a breach of its warranty of workmanlike service. The stevedore, rather, attempted to support the finding of the District Court judge that the accident was not caused by a dangerous condition of which the third-party defendant had obvious notice, but, rather by a latent defect, which was unknown both to the shipowner and to the stevedore.

The stevedore, in its Petition to this Court, still seeks to rely upon the finding of the District Court judge that the injury was caused by a "latent defect". It persists in ignoring the effect of the jury finding. It also ignores the opinion of the Court of Appeals on the binding effect of the jury finding, although the Court of Appeals made this very clear in its opinion when it said:

> "The court, however, over objection of the shipowner, took additional expert testimony in opposition to the shipowner's claim for indemnity and made the finding above referred to that the sole cause of

the accident was the latent defect in the packing case that plaintiff broke through.

"There is thus squarely raised the question of law whether, when the principal claim is tried to a jury and the third-party plaintiff's claim for indemnity is tried to the court, the court is bound by the verdict of the jury. There can be but one answer to this question. One of the purposes of Rule 14(a) of the Federal Rules of Civil Procedure which allows the bringing in of a third-party defendant is to make the evidence adduced by the plaintiff against the defendant available as a basis for the claim of the third-party plaintiff against the third-party defendant. Inconsistent determinations based upon the same evidence at the same trial are logically impossible. The court must follow the verdict of the jury. *Knell* v. *Feltman*, 85 U. S. App. D. C. 22, 174 F. 2d 662, 665; *Drago* v. *A/S Inger*, 2 Cir., 305 F. 2d 139, 141." (Page 37 of Appendix to Petition).

The stevedore did not present any evidence that it was impossible for it to have discharged this cargo in a manner which would have prevented injury. The testimony of their expert,—who was called upon to testify after the jury had already made its finding of fact—was merely to the effect that chocking to stabilize the cargo was not necessary, nor was it necessary to lay dunnage boards down between the tiers of the cargo, and that, even if there were no dunnage used in stowing the cargo, it nevertheless, was stowed properly and the stevedore's expert drew the conclusion that the accident to the plaintiff could have occurred only as a result of a "latent defect" in a "board" in the "veneer" top of a cargo case.

If, as the stevedore now asserts in its petition, there was no way in which it could have discharged this cargo with reasonable safety, and thus prevented the injury to the plaintiff, then testimony to that effect should have been

presented to the District Court. In that manner, the issue of whether the Stevedore acted reasonably in the face of a hazardous working condition could have been decided as a question of fact. The Stevedore chose to concede that it was negligent to continue to unload, but argued that there was no dangerous condition and, if there were, it did not cause the injury. The jury decided otherwise. The Petitioner is asking the Supreme Court of the United States to make a finding of fact that it, as a stevedore contractor, could not have taken any reasonable steps to prevent the injury to its own employee, merely on statements made in the Petition, although no evidence to that effect was ever submitted.

(b) *The Opinion of the Court of Appeals is not contrary to any principle enunciated by this court, or to any decisions of this court.*

The Petitioner implies that the Court of Appeals ignored the findings of fact of the District Court without deciding that the District Court's findings of fact were obviously against the weight of the evidence, or were "clearly erroneous" (Civ. Rule 52(a)).

The Court of Appeals did not ignore,—nor did it overrule—the findings of fact of the District Court. Rather, the Court of Appeals held, as a matter of law that the finding that the injury to the plaintiff had been caused by a "latent defect" in a "blind board" of a "veneer" top of a case could not be made since it was directly contrary to the findings of fact implicit in the jury verdict.

Petitioner does not contest either the propriety under the law or the necessity under the facts, for the Court of Appeals' holding that the "latent defect" finding by the District Court was contrary to the only finding which

could be implicit in the jury verdict,—to wit, that the injury to the plaintiff resulted from a hazardous working condition due to "topsy turvy", "tilted", "wobbly" cargo cases, as a consequence of the cargo being stowed without dunnage; nor does the Petitioner question that it was its duty as a stevedore contractor to remedy hazardous working conditions before permitting its longshoremen to perform the work of stevedoring.

In view of these incontestable statements of law and fact, it is absurd for the Petitioner to complain that the Court of Appeals refused to follow a finding of fact by the District Court and awarded the shipowner "automatic indemnity".

(c) *The law fully supports the conclusion that under the Jury's findings the Stevedore contractor was negligent.*

The Court of Appeals put the point very clearly when it said (311 F. 2d 413, 415):

> "* * * The testimony was that the allegedly dangerous condition of the stowage was obvious and that the stevedore nevertheless went ahead with the work. This would constitute a breach of the stevedore's warranty to the shipowner of safe performance of the work and render the stevedore liable for indemnity. De Gioia *v.* United States Lines Company, 2 Cir., 304 F. 2d 421."

Far from there being a conflict in the Courts on this point, every Court of Appeals that has examined the question has decided it in the same way. No one, perhaps, has better explained the philosophy behind the legal theory that the stevedore must be responsible for the prevention of injuries to his own employees where such prevention is within his control than District Court Judge Mathes in

Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (D. C. S. D. Cal. 1959; aff'd 274 F. 2d 875; cert. den. 363 U. S. 803 (1960), at Page 609 of 170 F. Supp.:

> "The stevedoring contractor represents himself to be, and is assumed to be, expert and experienced in the work of loading and unloading cargo, while the individual longshoreman may or may not be * * *"

and continuing at Page 610

> "The stevedore contractor knows that the ship has been at sea; that she may be in every respect dangerous to the life and limb of the unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner normally must pay for standby time.
>
> "Stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers. To this end, the stevedoring contractor is usually given full use and charge of the ship's loading and unloading equipment and appliances and the cargo hatches and holds. So it is that the stevedoring contractor cannot reasonably expect, and does not expect, to board a vessel which in all respects, as to equipment and appliances as well as hull, is in a seaworthy condition, or even in a reasonably safe condition."

In affirming Judge Mathes' decision, the Court of Appeals for the Ninth Circuit said at 274 F. 2d 875, that

> "* * * the policy considerations discussed by the court below seem valid (a) the possibility, or even probability of unseaworthiness after long voyages, and (b) the expertise of the stevedoring company and its employees."

The same legal reasoning supports the decision of the Fourth Circuit in *Smith* v. *Jugosalvenska Linijska Plovidea*, 278 F. 2d 176 (4 Cir. 1960); and in *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82 (4 Cir. 1959); and of the Court of Appeals for the Second Circuit in *Parenzan* v. *Iino Kaiun Kabushiki Kaisya*, 251 F. 2d 928 (2 Cir. 1958); and in *Santomarco* v. *U. S. A.*, 277 F. 2d 255 (2 Cir. 1960) cert. den. 364 U. S. 823 (1960); *Shannon* v. *United States*, 235 F. 2d 457 (2 Cir. 1956); and in numerous District Court cases such as *Weigel* v. *M/V Belgrano*, 188 F. Supp. 605 (D. C. Oregon, 1960); *Nordeutsher Lloyd* v. *Brady-Hamilton Stevedoring Co.*, 195 F. Supp. 680 (1961); and *Cook* v. *M/V Wasaborg*, 189 F. Supp. 464 (D. C. Oregon, 1960).

These numerous decisions which, in effect, require that a stevedoring contractor must control the stevedoring work, since he is the expert in that field, are recognized by the shipping industry. At the Brooklyn Army Terminal, where the accident to the plaintiff occurred, both the stevedores and the shipowners worked pursuant to a "Maritime Safety Code for Stevedoring and Freight Handling" which contained recommended safety requirements for stevedoring in the entire port of New York. This Code provides that the stevedore's supervisory employee has the duty "to order work stopped temporarily to prevent personal injuries where conditions in his judgment so warrant." [Page 102a-Appendix]

Furthermore, the president of the third-party defendant in this case, Jack G. Imparato, in his testimony before the District Court agreed that it was the responsibility of his supervising employees to make certain that the place of work was safe before permitting the stevedoring work to continue. [Page 106a-Appendix]

In addition, the Chief of Pier Operations at the Brooklyn Army Terminal testified that it is the practice at that

Terminal for the supervisory employees of the stevedore contractor to order work stopped when a dangerous condition is encountered in the stevedoring operations. [Page 92a-Appendix]

It is apparent, therefore, that the opinion of the Court of Appeals in this case and the decisions of every Court of Appeals that has examined this matter,—or, indeed, every District Court that has done so—places the responsibility to avoid risk of injury to the longshoremen employees exactly where it belongs, upon the stevedore employer. As if to emphasize the correctness of the holding of these opinions, the United States Department of Labor promulgated certain "safety and health regulations for longshoremen" (29 Code of Federal Regulations, Sub-part (a) S.9.2), which specifically recognize that the full responsibility for the safety of its own employees during cargo handling must be borne by the stevedore contractor as employer of the longshoremen.

Statistics on injuries to longshoremen kept by the Department of Labor since the enactment of these regulations show dramatically that the philosophy of putting the responsibility for the safety of his men on the stevedore has resulted in a reduction of longshore injuries. These statistics indicate that the frequency rate of nation-wide longshore injuries per million man hours of employment has been reduced from 131.8 in 1960 to 125.3 in 1961; and further reduced to 113.7 for the first 6 months of 1962. The frequency rate of longshoremen's injuries in New York has been reduced from 117.9 in 1960 to 102.2 in 1961; with a further reduction to 97.2 for the first 6 months of 1962.

These Department of Labor regulations were drafted after the nation-wide hearings at which the informed members of shipping and stevedoring communities and representatives of longshore unions expressed their views. It

was generally agreed that the resulting regulations constitute a codification of what had been recognized in the trade at the time they were adopted as reasonably safe working practices.

Conclusion.

The so-called "Questions Presented" in the petition do not now,—and never did—exist in the case. They are creations of the Petitioner.

The legal issues decided by the Court of Appeals are well settled and based on sound legal reasoning and philosophy. The Petitioner has made no attempt to question these conclusions.

This is one of the many cases decided in recent years which place the responsibility for the prevention of injury to longshoremen on the stevedore employer. No case has held to the contrary. The shipping industry has recognized this practice and the Department of Labor Regulations has codified this custom. The enforcement of the theme that "Stevedoring is the responsibility of the Stevedore" has resulted in a steady decline in the number of injuries in the stevedoring industry.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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MOTION FILED MAY 31 1963 LIBRARY SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1069

IMPARATO STEVEDORING CORPORATION,
Petitioner,

v.

UNITED STATES LINES COMPANY,
Respondent.

MOTION AND BRIEF FOR *AMICUS CURIAE*, THE NATIONAL ASSOCIATION OF STEVEDORES, FILED IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1069

IMPARATO STEVEDORING CORPORATION,
Petitioner,

v.

UNITED STATES LINES COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICES OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The National Association of Stevedores respectfully moves this Court, pursuant to Rule 42 (1) of the Revised Rules (1954) for leave to file the accompanying brief as *amicus curiae*. The consent of the petitioner has been obtained. The consent of the respondent was requested but refused.

The interests of the movant in this case and its reasons for requesting leave to file the accompanying brief *amicus curiae* appear below.

Movant is a non-profit trade association composed of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 shoremen are employed by the Association's members. These members handled about 70% of all of the cargo lifted in this country.

The interest of the Association and of each of its members is seriously affected by the decision below in that in the field of actions for indemnity arising out of injuries to longshoremen the opportunity and right to present a defense by the stevedore has been denied. Put another way, the decision below has enunciated a rule which prevents a stevedore from offering evidence to show that he fulfilled the obligations imposed upon him by law in the performance of his work. This constitutes a deprivation of property without due process in violation of the constitutional rights of each of the Association's members. The total effect of this rule of law will be a staggering financial burden upon the stevedoring industry. Once again, we have an example of a rule which, instead of tending to prevent and reduce the number of accidents, actually encourages carelessness on the part of shipowners, thereby increasing the accident rate and, thus the financial burden which stevedores will be obliged to shoulder.

The Association believes that the entire shipping industry, shipowners, stevedores and longshoremen, will benefit by a reversal of the decision below in that the constitutional right of due process will be preserved and safety in this hazardous industry will be encouraged.

Movant, accordingly, requests leave to file the accompanying brief so that these issues which are of great importance to the stevedore and shipping industries can be presented to the Court.

Respectfully submitted,

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Dated: New York, N. Y.
May 29, 1963

BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS *AMICUS CURIAE*

Facts Pertinent To This Brief

The basic facts have been set forth in petitioner's brief and it is not necessary to repeat them here. There are, however, other pertinent facts and, in particular, on the findings of the trial court relating to the issues between petitioner and respondent which the National Association of Stevedores as Amicus feels should be presented to the Court and, accordingly are contained in its brief.

The interest of the National Association of Stevedores as *Amicus Curiae.*

The National Association of Stevedores is a non-profit trade organization of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 longshoremen are employed by the Association's members. These members handle about 70% of all of the cargo lifted in this country.

The interest of the Association in this case is as follows:

1. The individual and direct concern of the members of the Association with the preservation of the right to due process in indemnity actions arising out of personal injuries to longshoremen in which type of action each of the Association's members is constantly engaged.

2. The economic concern that the decision below, depriving stevedores in indemnity actions of the opportunity to present a defense, will place upon them financial burdens of staggering proportions never anticipated or planned for.

3. The moral concern that the health and well-being of those engaged in the shipping industry and, in particular, longshoremen, will be adversely affected and seriously so, by a rule of law such as that created by the decision below in that shipowners being granted what amounts to automatic indemnity will have little or no concern for fostering safety and thus, deterring accidents.

ARGUMENT

The Court of Appeals erroneously redetermined facts found by the trier of fact below upon the basis of substantial evidence and deprived the stevedore of the benefits of due process of law by precluding him from contesting the very issues upon which his liability, if any, was based.

The District Court, the trier of fact as to the indemnity issue, [App. 19a][1] specifically found that, with respect to the injuries sustained by the plaintiff in the basic action, the stevedore had not breached its warranty of workmanlike service [App. 205a].

The reversal of this holding by the Court of Appeals was assertedly posited on the view of that court that the jury's finding of liability on the shipowner determined the issues to such an extent that the shipowner was entitled to indemnification as a matter of law.[2] It is respectfully submitted that the Court of Appeals erred by virtue of a basic misconception of the source and nature of the stevedore's liability to indemnify under the decisions promulgated by this Court.

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[1] Officially reported at 202 F. Supp. 600.

[2] Officially reported at 311 F 2d 413.

It is fundamental that no judicially enforced liability arises unless there has first occurred the breach by one party of some discernable and definable duty—be that duty imposed by law, assumed by contract or a combination of both.[3]

However, it is equally fundamental that differing relationships and differing sources of liability require the application of differing criteria to determine the existence or non-existence of that liability.[4]

In the basic relationship between the vessel owner and the shore-based maritime worker doing traditional seamen's work, the ship has been held to the absolute and non-delegable obligation of providing a seaworthy vessel.[5] On the other hand, the relationship between the vessel owner and the independent stevedoring contractor is such as to have been held to make operative a different obligation, the warranty of workmanlike service.[6]

The error of the Courts of Appeals in the case at bar lay in its failure to give proper effect to the distinction between the two basic founts of liability involved, in its fail-

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[3] "(A) cause of action, in its legal and logical significance, is . . . ; an act or wrong which gives rise to a remedied liability which depends upon the existence of a legal duty binding upon defendant and unfulfilled by him, the branch thereof being the reasonable and probable consequences of the breach of duty."
1 C. J. S. "Action", Sect. 8 (f) p. 985.

[4] *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 76 S. Ct. 232.

[5] *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85; *Alaska Steamship Company* v. *Petterson*, 347 U. S. 396, rehearing denied 347 U. S. 994.

[6] *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124; *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co. Inc.*, 355 U. S. 563; *Crumady* v. *The S/S Jodchin Hendrik Fisser et al.*, 358 U. S. 423; *Waterman Steamship Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421; *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd. et al.*, 369 U. S. 355.

ure to distinguish between the responsibilities imposed by the warranty of seaworthiness on one hand and the warranty of workmanlike service on the other.

The duty incumbent on the shipowner to furnish a seaworthy vessel:

1. is non-delegable.

2. is absolute.

3. does not depend upon traditional concepts of fault or negligence.

4. does not depend upon a showing of notice or knowledge of the condition involved.

5. does not depend upon a showing of "reasonableness".

6. may often be inferred by the jury from the mere happening of the event.[7]

The warranty of workmanlike service, on the contrary, however,

1. does depend upon concepts of "reasonableness" or "unreasonableness".[8]

2. does require some notice or knowledge to render the stevedore liable.[9]

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[7] *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539; *United New York and New Jersey Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U. S. 613; *Boudoin* v. *Lykes Brothers Steamship Co., Inc.*, 348 U. S. 336; *Alaska Steamship Company Inc.* v. *Petterson*, 347 U. S. 396; *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96.

[8] Thus Ryan speaks of the stevedore's obligation "to stow the cargo in a reasonably safe manner." 350 U. S. 124, 132 Atlantic Gulf says "When the District Court charged that in determining petitioner's contractual obligation, the jury should decide 'whether or not there was a reasonably safe discharge' of the cargo", . . . 369 U. S. 355, 363.

[9] *Ignatyuk* v. *Tramp Chartering Corp.*, 2 Cir., 250 F. 2d 198; *Ferrigno* v. *Ocean Transport Ltd.*, 2 Cir., 309 F. 2d 445; *Calderola* v. *Cunard Steamship Company*, 2 Cir., 279 F. 2d 475.

3. is not to be presumed breached from the mere happening of an accident aboard ship during the course of stevedoring operations.

Here, the testimony given before the jury clearly shows that the condition of stowage with which the stevedore was faced (though not of the stevedore's making) was less than ideal.

All agree that stevedoring is, per se, a hazardous industry and one in which the accident rate exceeds the national norm. Thus, the mere opening of a ship's hatch, necessary to the discharge of cargo, brings into the realm of potentiality the chance that someone might fall into the hold thus uncovered, the use of a cargo hook raises the possibility that someone may be struck by that hook, etc., etc. Examples might be multiplied endlessly. Yet no one suggests that the mere occupation by the stevedore in an industrial area of operation more dangerous than most should make it the insurer of those for whom it performs its services. Or at least amicus hopes that no one suggests this although the interpretation, or rather misinterpretation, of some of the language of this Court raised a nagging suspicion that this, in effect, is exactly what some of the inferior courts unwittingly perhaps are bringing about.

At any rate, the Second Circuit would appear to have held, in its decision below, that the mere election of the stevedore to proceed with the work for which it has been hired is sufficient to render it liable to fully indemnify the shipowner no matter what the actual cause of the accident might have been and no matter at whose door the practical layman might lay the ultimate responsibility for the injury to the worker. We will assume, *arguendo*, the existence of this remarkable policy as a rule of law applicable in this matter.

But, if we say that every time that an accident occurs aboard ship involving a condition later determined by a jury to be unseaworthy, the stevedore is thereby rendered liable to indemnify the shipowner, we make a mockery both

of the prior pronouncements of this Court and of traditional principles of indemnification. This, we submit, is the exact import of the decision of the Court of Appeals herein.

Each time the stevedore goes aboard a vessel to perform the work for which it was hired, it must (if we accept the scope of obligation imposed by the Second Circuit) make a decision as to the prospective safety of performance under the conditions then and there obtaining. Obviously, on some occasions conditions will be presented that will appear to be relatively safe. On other occasions, undue and excessive hazards will be readily apparent.

But upon still other occasions, the conditions presented will not be so clearcut and will be on the borderline between undue peril and reasonable safety.

In judging "reasonableness" foresight is the clear criterion—not hindsight.[10] Thus in determining whether or not the stevedore had performed its obligations in a satisfactory manner, the trier of fact was compelled to evaluate whatever dangers were apparent to the stevedore, what could have been done, and what was done, to minimize those dangers and whether, after taking maximum safety precautions, the stevedore was nonetheless "unreasonable" in pursuing the work at all.

The determination of "reasonableness" is a factual question under our system of jurisprudence. In this case, the trier of fact was Judge Bruchhausen, the District Court judge. The personal reactions of an appellate tribunal should play no role in the assessment of the legal rectitude of a determination by the trier of fact as to matters peculiarly factual:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can so determine facts found by the jury any more then the District Court can predetermine them."
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> *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355, 358, 359.

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[10] *Damanti* v. *A/S Inger*, 314 F. 2d 395.

That the trier of fact herein was a judge—not a jury—does not alter the basic rule that the Court of Appeals does not determine facts *de novo*. *McAllister* v. *U. S.*, 348 U. S. 119; *Guzman* v. *Pichirilo*, 369 U. S. 698.

The decision of the Court of Appeals completely neglects the possibility that the proximate cause of the plaintiff's injury, as found by the jury might well have been a latent condition of improper stowage as to this particular crate which formed a portion of plaintiff's work surface. It (the proximate cause) might well have been the latently defective condition of the crate onto which plaintiff stepped (the condition which Judge Bruchhausen found to have actually been the proximate cause of the accident). It might have been some condition not sufficiently patent to charge the stevedore with notice but sufficiently dangerous to render the vessel unseaworthy.

In the presence of varying grounds of possible ship liability, this Court has plainly declared that it is not the function of an Appellate Court to pick and choose among those grounds to select one which will sustain the imposition of third party liability upon the stevedore. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd. et al.*, 369 US 355.

The function of a trial court (sitting without a jury) is the determination of the facts upon which legal conclusions are to operate. Judge Bruchhausen found as facts:

> A. The third party defendant stevedore had no notice, actual or constructive, of the condition of the individual cartons and crated themselves and did not have any knowledge of any latent defects (F. F. 10).
>
> B. No warnings of possible defects in individual crates was given to the third party defendant stevedore at any time by the defendant shipowner (F. F. 11).

C. No dunnage was used for flooring in the No. 1 hatch and testimony disclosed that the main purpose of dunnage would be to insure a dry cargo and that this type of cargo in the No. 1 hatch does not necessarily require dunnage for proper stowage (F. F. 16).

D. Some of the individual crates within this cargo were wobbly (F. F. 17).

E. The disarray and wobble were found only in isolated occasions (F. F. 22).

F. That it is the customary, normal, accepted and safe stevedoring practice in the Port of New York to walk atop cargo of the type involved during discharging operations (F. F. 25).

G. The longshoremen faced with a condition of wobbly stowage acted reasonably in forming the bucket brigade to eliminate as much activity as possible (F. F. 39).

H. The defendant stevedore performed the discharging operation in a reasonable and workmanlike fashion (F. F. 41).

In his written opinion Judge Bruchhausen concluded:

"Under these circumstances there was no breach of the stevedore's warranty of workmanlike services."

It should seem obvious that the jury, in passing upon the basic issues between plaintiff and shipowner, had absolutely no interest in whether or not stevedoring services were performed in a reasonable manner. Accordingly, no testimony as to the propriety or impropriety of the stevedore's work was submitted to the jury.

Any testimony relevant to the essential issue (as between shipowner and stevedore) of the adequacy and "reasonableness" of the stevedore's performance was heard

only before the judge. Thus the appellate's court's bald observation, "Inconsistent determinations based on the same evidence at the same trial are logically impossible", is completely inappropriate when it is borne in mind that the basic action and the third party action involved 1) a different ground of liability 2) different issues 3) different (or at least additional) evidence.

It we accord the holding of the Second Circuit its proper logical effect, then any stevedore's testimony on the indemnity phase of the trial is rendered completely nugatory since the issues have been finally and fully concluded by the resolution of the plaintiff's claim.

If the stevedore is denied the opportunity of presenting evidence of proper performance *after* the main issues have been concluded, may it not, then, introduce evidence as to its compliance with its warranty of workmanlike service *prior* to the conclusion of the main part of the trial? If so, for the plaintiff's attorney would urge, and rightly so, that he had no claim against the stevedore and such evidence had no place in the resolution of the issues between worker and shipowner.

If the stevedore's evidence is to be given no effect *after* the conclusion of plaintiff's action, and if stevedore's evidence is to be granted no foothold *before* the conclusion of the basic action, when *does* the stevedore receive an opportunity to demonstrate that which his ultimate liability or non liability is said to depend, the workmanlike performance of his service? Or is his testimony as to the quality of his performance of no legal significance — the granting of indemnity being automatic?

The consequences of the widespread adoption of the rule here announced by the Second Circuit are horrifying and devoid of judicial respect for the constitutional rights of a major American industry.

Conclusion

The decision below should be reversed for the reasons urged by petitioner and for the reasons urged in this brief. In particular, the Association feels that the rule of law promulgated by the Court of Appeals herein threatens a major American industry with the deprivation of its property without the benefit of any opportunity to contest its alleged liability in a court of law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1069

IMPARATO STEVEDORING CORPORATION,

Petitioner,

—v.—

UNITED STATES LINES COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER

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The disingenuous arguments of respondent in its brief in opposition dictate a very short reply by the petitioner.

In its attempt to pervert the questions which are presented by the petitioner for a review by this Court the respondent concludes its view of the questions presented with its inquiring as to the stevedore's liability under hazardous working conditions "without taking any reasonable and effective steps to avoid injury to its own employees?" (Page 6 of respondent's brief.)

It disregards completely and has always disregarded the fact that the trier of the facts, in this case the Trial Court alone, has determined on the *evidence* that the petitioner acted reasonably under all of the circumstances in forming the bucket brigade and in handling the discharging operation as it did.

Recognizing the frailty of its position in this regard and the fact that the Court of Appeals overlooked com-

pletely this finding which is critical in cases of this type the respondent suggests at pages 9 and 10 of its brief that in order to prove that it acted reasonably the petitioner should have introduced testimony to that effect. We assume that the respondent means that an expert should have been called to testify that there was no way in which the cargo could have been discharged except in the manner in which the petitioner testified it was done. This Court, as recently as May 28, 1962, held that in a jury case expert testimony is not necessary if the primary facts can be accurately and intelligibly described to a jury and that the jury is as capable of drawing the correct conclusions as are witnesses possessed of special skill, etc. *Salem v. United States Lines Company*, 370 U. S. 31, 82 S. Ct. 1119. No expert testimony was needed in this case for the trier of the facts here, the Trial Court alone, to determine whether the petitioner acted reasonably. Indeed, that conclusion was solely for the trier of the facts and was not within the mouthings of any expert witness. It is interesting to note that the argument which is advanced in this case on the subject of the need for expert testimony is advanced by the very same party who advanced the same in the *Salem* case and by the very same attorneys who represented the very same respondent in the *Salem* case.

The respondent does not meet in any way the finding which is crucial in this matter, as made by the District Court and disregarded by the Court of Appeals, viz., the petitioner acted reasonably and discharged properly its warranty of workmanlike services.

The finding of the jury of the respondent's liability did not in any way conclude the issue of the petitioner's liability to the respondent. *Chicago City* v. *Robbins*, 2 Black 418; *Washington Gaslight Co.* v. *District of Columbia*, 161 U. S. 316, 16 S. Ct. 564.

In attempting in its brief in opposition to the petition to show that there is no conflict between this matter and *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 310 F. 2d 481 (1962), cert. granted April 15, 1963, the respondent does not appreciate, or chooses to disregard, the thrust of the petition. Respondent says at page 7 of its brief that the petitioner has raised no place, not even in its petition to this Court, the question of the petitioner's negligence where it permitted its men to work in a dangerous place. Indeed, the petitioner raises that question in its petition and indicates that the District Court had found that the petitioner was not negligent and had acted reasonably in light of the conditions which it found. Thus, the Ninth Circuit in the *Italia* case requires negligence as a prerequisite to stevedore's liability and in this case the Second Circuit holds that negligence is not necessary and that automatic indemnity applies in the factual picture in this case.

It is respectfully submitted that for the reasons stated in the petition this Court should exercise its certiorari powers by granting the petition in order (a) to correct a manifest injustice and (b) to settle the law, important to the stevedoring industry. The importance of this question to the industry will be indicated to this Court by the motion of the National Association of Stevedores to file a brief as amicus herein.

Respectfully submitted,

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May 29, 1963